

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)	
and)	
STATE OF NEW MEXICO, <i>ex rel.</i> STATE)	
ENGINEER,)	
)	
Plaintiffs,)	No. 01cv00072 BB/WDS
)	
and)	
)	ZUNI RIVER BASIN
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ADJUDICATION
)	
Plaintiffs in Intervention,)	Subfile No. ZRB-1-0100
)	JOANN STRICKLAND
v.)	TRUST
)	
A & R PRODUCTIONS, et al.)	
)	
Defendants.)	
)	

**MOTION FOR DEFAULT JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY JUDGMENT**

The Plaintiffs United States of America (“United States”) and State of New Mexico *ex rel.* State Engineer (“State”) hereby move the Court to enter judgment against the Defendant Joann Strickland Trust in conformance with the *Zuni River Basin Adjudication Hydrographic Survey Report for Subareas 4 and 8* as amended (“HSR”). In support of this motion, Plaintiffs assert:

1. PLAINTIFFS ARE ENTITLED TO DEFAULT JUDGMENT AGAINST THE JOANN STRICKLAND TRUST WITH RESPECT TO SUBFILE ZRB-1-0100.

1. Joann Strickland was joined as a defendant in this civil action by the United States original *Complaint* (Doc. No. 1) and waived service of a summons on September 5, 2003 (Doc. No. 362, filed May 13, 2005). In addition, the Joann Strickland

Trust was joined as a party defendant by Order of the Court on November 22, 2005 (Doc. No. 403). Joann Strickland also waived service of a summons on behalf of the Trust (Doc. No. 430).

2. Subfile ZRB-1-0100 concerns property owned by the Joann Strickland Trust in Sub-Area 8 of the Zuni River Stream System.

3. As indicated in the *Declaration of Gary A. Durr*, submitted herewith as Exhibit 1, pursuant to the Special Master's September 8, 2005 *Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System* (Doc. No. 387) ("September 8, 2005 Procedural Order"), defendants in Sub-Areas 4 and 8 were sent a service packet that included, *inter alia*, a proposed Consent Order, a Request for Consultation form, a form Subfile Answer, and the Special Master's approved *Notice of Water Rights Adjudication*. The service packet was mailed to the defendant's mailing address via certified mail, return receipt requested. Joann Strickland signed the certified mail receipt, acknowledging delivery of the service packet for the Joann Strickland Trust, on October 11, 2005.

4. Section III.B.1 of the September 8, 2005 Procedural Order required defendants who disagreed with any element of a proposed Consent Order to return a Request for Consultation form and to discuss their disagreement in good faith with the United States and the State. Section III.B.2 of the Order provided that a defendant's "failure to sign and return a *Consent Order* or file a form *Answer* by January 10, 2006 shall be considered grounds for entry of a default order which incorporates the proposed *Consent Order*." This deadline was never extended.

5. Defendant Joann Strickland Trust failed to return a Request for Consultation form or a signed Consent Order, or to serve or file any form of Subfile Answer with respect to Subfile ZRB-1-0100 before January 10, 2006.

6. Defendant Joann Strickland Trust is in default for failure to appear, answer, or otherwise defend in Subfile ZRB-1-0100 within the time limitations imposed by the applicable Procedural and Scheduling Order, as shown by the Clerk's Certificate of Default filed February 2, 2009 (Doc. No. 2094).

7. As attested by the *Declaration of Kit F. Nielsen, P.E.*, submitted herewith as Exhibit 2, the purpose of use the HSR originally identified for well 8B-2-W01 in Subfile ZRB-1-0100, and included in the consent order offered for the subfile, appears to have been erroneous. The adjudicated purpose of use for that well should be "72-12-1 DOMESTIC ONE HOUSEHOLD." In all other respects, and in accordance with the *Zuni River Basin Adjudication Hydrographic Survey Report for Sub Areas 4 and 8*, as amended, the rights of the JOANN STRICKLAND TRUST to divert and use the public waters of the Zuni River Stream System, Sub-Areas 4 and 8, should be as set forth in Paragraph 6 of Exhibit 2.

2. IN THE ALTERNATIVE, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AGAINST THE JOANN STRICKLAND TRUST WITH RESPECT TO SUBFILE ZRB-1-0100.

Statement of Undisputed Facts

8. In support of this alternative motion for relief, Plaintiffs hereby adopt and reassert the contentions in the preceding Paragraphs 1-7.

9. Although the Defendant Joann Strickland Trust did not request consultation concerning the proposed Consent Order for Subfile ZRB-1-0100, a

representative of the Defendant attended consultations scheduled concerning other subfiles in Grants, New Mexico on February 8, 2006. The Defendant's representative provided no evidence that Defendant's historic beneficial use of water was different from that identified by the HSR, but insisted on an asserted legal entitlement to quantification of the water rights for the Subfile's wells that was not based on beneficial use. Defendant did not agree to the terms of the Consent Order for Subfile ZRB-1-0100 during, or following, that meeting.

10. On February 24, 2006, Joann Strickland, acting as Trustee of the Joann Strickland Trust filed with the Court a form Subfile Answer concerning Subfile ZRB-1-0100 (Doc. No. 495). A copy of the form Answer was received by Counsel for the United States on March 2, 2006.

11. The sole basis asserted by Defendant's Subfile Answer for objecting to the Consent Order proposed for Subfile ZRB-1-0100 was the following statement, on page 2 of the Answer, which is a verbatim replication of a stock objection asserted in numerous other unrelated subfiles:

Defendant objects to Plaintiff's consent offer for a NMSA 1978, §72-12-1 well for any amount of water less than three acre feet per year, based upon the existence of a property or vested right for three acre feet per year as provided by statute and the rules and regulations of the State Engineer, and/or a property or vested right in a permit allowing the diversion of up to three acre feet per. The defendant has used or intends to use up to three acre feet per year for the irrigation of not more than one acre of noncommercial trees, lawn or garden; in household or other domestic uses and/or for livestock purposes.

12. The Consent Order offered to Defendant described a total of 22 distinct surveyed water uses: 16 ponds and 6 wells. Only one of the wells included in the subfile, the well identified by map label 8B-2-W01, was permitted under NMSA 1978 §72-12-1. Defendant's Subfile Answer raised no issue plausibly pertinent to the other 21

water rights offered by Plaintiffs and Defendant has not otherwise advised Plaintiffs of any error in the hydrographic survey of any of the 22 uses included in the subfile.

13. Neither by means of the Request for Consultation form required by the September 8, 2005 Order, nor during the impromptu appearance at the February 8, 2006 consultations, did Defendant disclose to Plaintiffs any evidence that the historic beneficial use from well 8B-2-W01 has exceeded .7 acre feet per year – the water right amount offered by Plaintiffs.

Standard of Review

Fed.R.Civ.P. 56(c) provides that summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” In Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986), the Court interpreted the plain language of Rule 56(c) to “mandate[] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” While “[t]he burden of showing the absence of a genuine issue of material fact, and an entitlement to judgment as a matter of law is upon the movant, . . . a party opposing summary judgment ‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1196 (10th Cir. 2005) (quoting Matsushita Electric Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986)).

Argument

I. DEFENDANT MAY NOT NOW INTRODUCE EVIDENCE IN OPPOSITION TO THE PLAINTIFFS' PROPOSED ADJUDICATION OF THE SUBFILE ZRB-1-0100 WATER RIGHTS.

Paragraph III.B.1 of the September 8, 2005 Procedural Order provides that:

[g]ood faith participation in consultation with the United States and the State is required to satisfy the discovery requirements of Rule 26(a)(1)(A) and (B) of the Federal Rules of Civil Procedure, and must be accomplished before the dispute can be placed before the Court. Accordingly, Claimants are required to consult with the United States and the State, and are expected to make available documents or other information that support their position.

This same language was included, and emphasized, in the *Notice of Water Rights Adjudication* which was approved by the September 8, 2005 Procedural Order and included in the service packet sent to Defendant. Defendant's failure to request consultation in the manner specified by the September 8, 2005 Procedural Order, or to provide Plaintiffs with any evidence of historic beneficial use different from those uses identified by the HSR, therefore constitutes a failure to disclose within the meaning of Fed.R.Civ.P. 37(c)(1), which provides, *inter alia*: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

Defendant's failure to comply with the September 8, 2005 Procedural Order, despite being fully advised of the order's requirements, was unjustified and directly contravenes a core purpose of that order to encourage the prompt disclosure of pertinent information through the consultation process. Defendant therefore should not now be permitted to offer evidence not previously disclosed to Plaintiffs.

II. BECAUSE THE DOCTRINE OF BENEFICIAL USE APPLIES TO WATER RIGHTS FOR WELLS PERMITTED PURSUANT TO NMSA 1978 §72-12-1, PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

It is well-established that all water rights arising under New Mexico state law, including water rights for domestic wells, are limited to the amount applied to beneficial use. *See* N. M. Const., art. 16, § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”); § 72-12-2 NMSA 1978 (“Beneficial use is the basis, the measure and the limit to the right to the use of waters described in this act.”); State ex rel. Martinez v. City of Las Vegas, 135 N.M. 375, 386, 89 P.3d 47, 58 (2004) (“As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to beneficial use.”) (quoting State ex rel. Cmty. Ditches v. Tularosa Cmty Ditch, 19 N.M. 352, 371, 143 P. 207, 213 (1914)); Hanson v. Turney, 136 N.M. 1, 94 P.3d 1 (Ct. App. 2004) (*inter alia*, discussing the distinction between water rights and permits to appropriate water).

This Court’s June 15, 2006 *Memorandum Opinion and Order* (Doc. No. 733), at 2, addressed requests to certify the following questions to the New Mexico Supreme Court:

whether existing statutes, agency regulations, and permits create a legal right and reasonable expectation of a property interest of three acre-feet per annum in a domestic well; whether domestic well users should have their right to divert up to three acre-feet per annum curtailed or limited without having been given prior notice of a beneficial use requirement; whether there exists a “protected interest” in a permit to appropriate water for domestic uses such that the interest may not be curtailed without prior notice; whether the diversion of water under a domestic well permit may be limited when the issuance of that permit is required under specified factual situations; whether a limitation upon a domestic well violates Art. IV, §34 of the New Mexico Constitution; . . . whether, under certain facts, the diversion of three-acre feet per annum should be permitted regardless of historic beneficial use

[and]

whether, in light of § 72-12-1, et seq., and the State Engineer's permits, the State should be estopped from offering owners of domestic wells less than three acre-feet of water.

After considering the relevant provisions of the New Mexico Constitution, statutes, and case law, this Court held that certification would be inappropriate because: "New Mexico law is clear on the subject. The constitutional provision and statutes cited above as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principle 'is applicable to all appropriations of public waters.'" Id. at 4 (*citing State ex rel. Martinez v. City of Las Vegas*, 89 P.3d at 58-9; and *State ex rel. State Eng'r. v. Crider*, 431 P.2d 45, 48 (1967)). The Court, at page 5, rejected, as unsupported by any authority, the contention of the parties seeking certification that "domestic uses are exempt from the beneficial use requirement".

Accordingly, the sole basis alleged by Defendant's Answer for objecting to the consent order proposed for Subfile ZRB-1-0100 is inconsistent with the New Mexico Constitution and Statutes, and with well-settled case law, including a previous decision of this Court in this civil action. Plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing arguments and undisputed material facts, the Plaintiffs request the Court to enter an order granting default judgment, or, in the alternative, summary judgment, against the JOANN STRICKLAND TRUST, incorporating the terms of the Consent Order proposed for Subfile ZRB-1-0100 and in

conformance with the *Zuni River Basin Adjudication Hydrographic Survey Report for Sub Areas 4 and 8*, as amended.

DATED: February 4, 2009

Electronically Filed

/s/ Bradley S. Bridgewater

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COUNSEL FOR THE STATE OF NEW
MEXICO EX REL. STATE ENGINEER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on February 4, 2009, I filed the foregoing *Motion For Default Judgment Or, In The Alternative, Summary Judgment* electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participants in the manner indicated:

Via U.S. Mail, Postage Pre-paid:

JOANN STRICKLAND TRUST
JOANN STRICKLAND, TRUSTEE
P.O. BOX 2554
MILAN, NM 87021

_____/s/_____
Bradley S. Bridgewater